(3)

No. 90-1108

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031
(808) 533-2242

Counsel for Petitioners Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Reply To Brief In Opposition To Petition For Writ Of Certiorari

I. Summary of the Case 1

II. The Right to Develop is an Integral Segment of Property Which is Not Rendered Immune From a Takings Challenge Simply by Virtue of Its Assignment 2

III. In Takings Claims Premised on Lack of Legitimate Regulatory Purpose, The Property Owner is Not Required to File Development Plans, Since Permitted Use of The Property is Not Relevant 5

IV. Conclusion 7

TABLE OF AUTHORITIES

Cases: PAGE

A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) 6

Agins v. City of Tiburon, 447 U.S. 255 (1980)..... 5

Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988)..... 6

Dickman v. Commissioner, 465 U.S. 330 (1984)..... 3

HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (D. Va. 1985)..... 5

Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).....*passim*

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 2

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 3

Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989)..... 6

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).....2-3, 4, 5

Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 3

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 3

Wheeler v. City of Pleasant Grove, 746 F.2d 137 (11th Cir. 1984) *later proceedings* 833 F.2d 267 (11th Cir. 1987)..... 6

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)..... 2, 6

PAGE

Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988) 5

Other Authorities:

Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zon. & Plan. L. Rept. 57 (Sept. 1988)..... 5

Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zon. & Plan. L. Rept. 57 (Sept. 1990)..... 5

Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use & Zon. Digest 3 (Jan. 1990)..... 5

Mandelker & Blaeser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zon. & Plan. L. Rept. 49 (Jul. & Aug. 1988) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1108

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Summary of the Case

This case was brought against the City and County of Honolulu ("City") by petitioners Kaiser[1] and Bishop, seeking, *inter alia*, relief in inverse condemnation for an uncom-

1 Petitioners will be referred to collectively as "Kaiser." A separate petition for writ of certiorari filed by intervenors/plaintiffs Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate ("Bishop") is also pending before this Court. *See Richard Lyman, Jr., et al. v. City & County of Honolulu*, No. 90-1078 (petition for cert. filed Jan. 2, 1991).

pensated taking. This taking was accomplished by ostensible regulations which in truth were an avowed effort to extort Kaiser's and Bishop's property, and by "condemnation blight," whereby property which is targeted for acquisition is *de facto* taken by delay or other unreasonable conduct as a prelude to acquisition.

The United States District Court for the District of Hawaii granted summary judgment in favor of the City against Kaiser. Kaiser possesses the exclusive right to subdivide, develop, improve, and use certain parcels of Bishop's land (known as "Queen's Beach") pursuant to a 1961 agreement ("assignment"). The district court held that the right to develop Queen's Beach is not property because Kaiser possessed it, and that Kaiser has no right to bring a takings claim when the City conditions approval of reasonable development on the "donation" to the City of portions of Queen's Beach as a public park. *Kaiser Dev. Co. v. City & County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) (Pet. App. 1a-44a). The district court also held that Kaiser's and Bishop's takings claims were not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). *See* Pet. App. 23a-31a. The court of appeals affirmed in a one paragraph *per curiam* opinion. Pet. App. 46a; 898 F.2d 112.

II. The Right to Develop is an Integral Segment of Property Which is Not Rendered Immune From a Takings Challenge Simply by Virtue of Its Assignment

The City acknowledges (*see* City's Brief in Opposition at 17) that Kaiser possesses the exclusive right to develop Queen's Beach, yet claims that this right is subject to uncompensated acquisition because Kaiser possesses the right by way of the assignment. The City ignores the decisions of this Court that hold that the right to "build upon one's own property," is a fundamental right. *E.g.*, *Nollan v. California*

Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).[2] The City claims instead that "[t]he *mere* right to develop is not a protected property right," City's Brief in Opposition at 19 n.31 (emphasis added), and reduces the fundamental right to develop and use property to a mere "expectancy" not deserving of fifth amendment protection simply because it was assigned by contract from the fee owner to a developer. *Id.* at 12-13. The City and the district court relied on *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) as dispositive of the property issue, but interestingly, both the district court and the City relegated discussion of the case at the crux of this issue, *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893), to footnotes. *See* Pet. App. 15a; 649 F. Supp. at 934; City's Brief in Opposition at 11-13.[3] The City's "analogy" of Allegheny's steel plate to Queen's Beach (City's Brief in Opposition at 12) is misleading for two reasons. First, there is no suggestion in *Omnia* that a contractual right to purchase is a fundamental attribute of property. In the present case, however, the right to develop is a fundamental property right. Second, Omnia did not have possession of the right to the steel which it claimed was taken. Here, though, Kaiser has exclusive possession of the right to develop, and has held it since 1961.

---

2 This is a long-standing principle. *See e.g.*, *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893).

3 In *Omnia*, Omnia had the right to purchase steel from Allegheny Steel Company. Prior to delivery of the steel to Omnia, the federal government confiscated Allegheny's entire production for the following year, thus rendering delivery of the steel to Omnia impossible. *Id.* at 507. When Omnia sought compensation from the government, the Court held that the contract between Omnia and Allegheny was not taken by the government.

The City mischaracterizes Kaiser's enormous losses in this case as mere consequential results of the City's actions, and attempts to immunize itself from the requirements of the constitution by labeling its taking of the right to develop a result of common impossibility of performance or commercial frustration of contractual expectations.

By holding that developers who are assigned exclusive possession of a landowner's property right to develop (but do not possess a traditional estate in land) have no rights when the right to develop property is taken, the courts below treat developers as pariahs—a class of property owners without rights who may be trampled upon by open and notorious extra-legal municipal conduct without regard to the constitution.

The decisions of this Court have never required that a property owner possess a physical interest in land in order to have standing to assert a taking. When governmental action confiscates an entire "stick" of the property bundle such as the right to develop, it is enough that the person claiming the taking have a present personal interest in that stick sufficient to demonstrate standing.[4] *See* authorities at 12-14 of Kaiser's Petition for Writ of Certiorari. *Cf.* Pet. App. 16a n.8; 649 F. Supp. at 935 n.8 (Kaiser has no property since it did not possess a tangible right). Kaiser's right to develop, however, is a tangible right, both to the parties and to the courts,[5] without regard to whether an owner is "vested" under state law. *See Nollan*, 483 U.S. at 833 n.2.[6] In the present case, Kaiser is in

---

4 The City asserts that Bishop, as the fee owner, would have standing to claim the value of the development rights in this case. *See* City's Brief in Opposition at 19 n.23. Bishop, however, has no standing to claim its development rights have been taken, since it assigned these rights exclusively to Kaiser. It is notable that the City criticizes Kaiser for "mischaracterizing" the assignment, yet the City's selective account of the assignment fails to mention the specific language by which Bishop and Kaiser explicitly recognized Kaiser's property interest. *See* Kaiser's Petition for Writ of Certiorari at 6.

5 The City claims three Hawaii cases hold that Kaiser's right to develop is not property. City's Brief in Opposition at 19 n.31. As noted in Kaiser's Petition at 14 n.22, however, each of these cases involved Kaiser's interest in parcels already developed by Kaiser. Therefore, under the terms of the assignment, Kaiser had no interest in developing those parcels, since the development process was over.

6 The district court noted that vesting is not relevant to whether Kaiser's right to develop is property. Pet. App. 22a n.14; 649 F. Supp. at

possession of that tangible right, and must have standing when it has been taken without compensation.

III. In Takings Claims Premised on Lack of Legitimate Regulatory Purpose, The Property Owner is Not Required to File Development Plans, Since Permitted Use of The Property is Not Relevant

The City asserts that the lower courts are not in a state of conflict and confusion over rational application of the ripeness standard. Many courts and commentators dispute the City's position.[7]

The City also asserts Kaiser's claim that the City's actions were without legitimate regulatory purpose is not ripe until an application for preservation uses is filed. City's Brief in Opposition at 21-23. The City overlooks the fact that when a municipality undertakes a course of conduct without a legitimate regulatory purpose, applications for use are irrelevant, and a case is ripe regardless of the economic uses available to the property owner after the unconstitutional conduct. *See Nollan*, 483 U.S. at 830; *Agins v. City of Tiburon*, 447 U.S. 255 (1980).[8] The focus of such cases is on the govern-

---

938 n.14. Yet, the City impliedly asserts that until a developer has vested under state law, it has no standing to contest a taking of development rights. *See* City's Brief in Opposition at 20 n.33.

7 *See, e.g., Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1201 n.6 (N.D. Cal. 1988); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 671 (D. Va. 1985). *See also* Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zon. & Plan. L. Rept. 57 (Sept. 1990); Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use & Zon. Digest 3 (Jan. 1990); Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zon. & Plan. L. Rept. 57 (Sept. 1988); Mandelker & Blaeser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zon. & Plan. L. Rept. 49 (Jul.-Aug. 1988).

8 See also Brief Amicus Curiae of Pacific Legal Foundation in Support of the Petition for Writ of Certiorari (No. 90-1078) at 9-12 and authorities cited therein.

ment conduct, not the reasonable uses left the property owner. Here too, the lower courts are split.[9]

The application requirement of *Williamson County* was formulated to avoid having the courts decide claims that all viable use of property had been taken when it was uncertain whether any viable uses were left after regulation. *Williamson County*, 473 U.S. at 191. In a context where the government's purpose is not challenged, an application is necessary to fix the government's position. When, however, a takings claim is premised on a lack of legitimate regulatory purpose (and the government's position is fixed), the uses left the property owner (and thus the application requirement) are irrelevant. The absence of a legitimate purpose reveals the government's position, and ripens the claim.

That is precisely the circumstance here—the City made it clear throughout that no private use of Queen's Beach would be permitted unless the most valuable portions were "donated" for use as a public park. The decision by the City to disallow any use without this "gift" was a final decision. It would be pointless to require Kaiser to apply for uses the City made it clear it would not permit, or to require Kaiser to seek a "variance" from such illegal conduct, simply to gain a key to the courthouse door, when its applications for every conceivable viable economic use had previously been denied.[10]

---

9 *Compare Wheeler v. City of Pleasant Grove*, 746 F.2d 137 (11th Cir. 1984) *later proceedings* 833 F.2d 267 (11th Cir. 1987) *and A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *with Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989) *and Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

10 Additionally, where as here, economic viability of permitted uses is a genuine issue of fact and the City has repeatedly stated that no development plan would be approved until property was "dedicated," the property owner should not be required to file an application solely to fix the City's position. The City's position is concrete: no "gift," no development. Prior to the City downzoning and down-designating Queen's Beach as "preservation," Kaiser made at least seven meaningful applications for economically viable development, each in accordance with the then-existing land use regulation. Each application was denied. It is not surprising that the City would have Kaiser file an

IV. Conclusion

For the foregoing reasons, and for the reasons contained in Kaiser's Petition, it is respectfully prayed that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031
(808) 533-2242

Counsel for Petitioners
Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

---

application for "development" under preservation uses, since that would allow the City to downzone property with impunity, unless property owners spent the enormous time, effort, and money required to file illusory development plans. Such a scheme would effectively eliminate the complaints of property owners who could not afford to comply with such an expensive pointless requirement.